UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, **Plaintiff,** **- against -** **UNITED STATES DEPARTMENT OF DEFENSE,** **Defendant.**	:	**ECF Case** **No. 05 Civ. 5468 (JSR)**

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Through this lawsuit under the Freedom of Information Act ("FOIA") and the related FOIA litigation in *Associated Press v. U.S. Dep't of Defense*, No. 05 Civ. 3941 (JSR) (the "CSRT case"), the Associated Press ("AP") seeks to enforce the public's right to inspect records maintained by the Department of Defense ("DOD") relating to the detention of hundreds of individuals at the Naval Base in Guantanamo Bay, Cuba ("Guantanamo"). Most of these individuals are charged with no crimes and yet are being held for indefinite periods without even the rights generally accorded to prisoners of war under the Geneva Conventions. The public has a significant and legitimate interest in knowing who these individuals are, the reasons for their detention, how they are being treated, and the terms of their release.

As a result of this Court's order in compelling DOD to release detainee identifying information in the CSRT case, DOD has now largely withdrawn from its broad refusal to produce information sought by AP in this case. Only three categories of withheld information currently remain in dispute in this lawsuit: (1) the identifies of detainees at Guantanamo whose treatment has been the subject of official abuse inquires; (2) identifying information about detainees whose transfer or release from Guantanamo has occurred or is now pending; and (3) the identities of family members whose correspondence was used as evidence in two specific Administrative Review Board ("ARB") proceedings. In cross-moving for summary judgment, AP seeks an Order requiring DOD to release these categories of withheld information. AP also contests the sufficiency of DOD's search for documents concerning the release or transfer of detainees from Guantanamo. Redacted files were provided for just 23 detainees although many more detainees have been removed from Guantanamo. As set forth below, DOD has no proper basis to refuse to make public the information sought by AP.

STATEMENT OF FACTS

A. Background of this Dispute

Since January 2002, the United States government has detained approximately 750 individuals at Guantanamo. At least 267 detainees held at Guantanamo have been transferred out, and some 490 remain confined there today. *See* Declaration of Adam J. Rappaport ("Rappaport Dec.") Ex. C. The issues remaining in this case center on documents relating to allegations of abuse of detainees at Guantanamo and the documents relating to the administrative review process by which DOD annually decides whether to release, transfer, or continue to detain each prisoner.

1. Detainee Abuse Allegations

Concerns about mistreatment and abuse have been raised since detainees were first brought to Guantanamo. Several former detainees have alleged that they were abused at Guantanamo, *see, e.g.*, Glenn Frankel, *Three Allege Guantanamo Abuse*, Wash. Post, Aug. 5, 2004, at A12, and others have conveyed allegations of abuse through their attorneys, *see* Josh White, *Guantanamo Desperation Seen in Suicide Attempts*, Wash. Post, Nov. 1, 2005, at A1. Human rights organizations have charged that some of the handling and interrogation of detainees was "tantamount to torture." *See* Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. Times, Nov. 30, 2004, at A1. Even military officers and FBI agents who have worked at Guantanamo have questioned the treatment of detainees and the conditions under which they are being held. *See, e.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474 (D.D.C. 2005) (recounting FBI agent's allegations of detainee mistreatment); Neal A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantanamo Bay*, N.Y. Times, May 1, 2005, at A35. Most recently, the United Nations reported that the treatment of detainees in some cases "amounted to torture." *See* Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y. Times, Feb. 17, 2006, at A6.

Joint Task Force-Guantanamo ("JTF-Guantanamo") is the military unit responsible for overseeing the detainees. *See* Hecker Dec. ¶ 6. JTF-Guantanamo consists of several thousand U.S. service members, including the DOD personnel who serve as guards. *See id.* When there is an allegation of mistreatment of a detainee, the JTF-Guantanamo commander normally orders an officer to conduct an investigation. *See id.* ¶ 17a. At the completion of the investigation, the officer reviews the documents generated and determines whether to hold the subject criminally responsible. *See id.* JTF-Guantanamo maintains files of these disciplinary actions. *See id.* ¶ 7. These files normally consist of a record of the disciplinary action and a report of the investigation in the alleged conduct. *See id.* ¶ 8.

JTF-Guantanamo also maintains an automated database to "help [it] keep track of nearly every aspect of a detainee's daily life." *See* Rappaport Dec. Ex. D. The Detainee Information Management System ("DIMS") contains information about individual detainees, such as medical and behavioral notes, and detainee requests and refusals, as well as information about cells and cellblocks. *See id.* A "journal" section of DIMS keeps track of significant activities and noteworthy events in each cellblock. *See id.* When an incident of physically or verbally abusive conduct between detainees occurs, the DOD personnel who observe the incident record their observations and the results of any investigation into DIMS as a "Detainee Report." *See* Hecker Dec. ¶ 19a; *see also, e.g.*, Rappaport Dec. Ex. E.

In addition, some detainees alleged during their CSRT hearings that they had been threatened or harmed by other detainees. Following these CSRTs, JTF-Guantanamo's legal staff has generated memoranda and other records of investigations into these allegations.

2. Administrative Review Board Procedures

After confining "enemy combatants" at Guantanamo, DOD initially asserted that they could be held there indefinitely until the end of the war on terrorism, with virtually no legal rights under U.S. law or international treaties. Detainees at Guantanamo and elsewhere challenged the process by which they were designated enemy combatants and the legality of their imprisonment by the United States. While *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) were pending before the Supreme Court, DOD created an Administrative Review Board ("ARB") to conduct an annual review of the status of each of detainee designated an enemy combatant. *See* May 11, 2004 Order of Deputy Secretary of Defense Paul Wolfowitz ("Wolfowitz Order") (Hecker Dec. Ex. 1). The ARB is a significant element of a process designed to determine whether each detainee should be released, transferred to the custody of another country, or further detained, based primarily on whether he remains a threat to the United States. *See* Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba ("Implementation Mem.") ¶ 1 (Hecker Dec. Ex. 2).

The relevant procedures followed in ARB hearings are similar, but not identical, to CSRT hearings. Each ARB is comprised of three commissioned military officers. *See* Hecker Dec. ¶ 3c. The government, through a Designated Military Officer, presents evidence concerning the detainee to a session of the ARB. *See* Implementation Mem., Encl. (4) ¶¶ 1g, 2e. Detainees are provided with an Assisting Military Officer ("AMO"), and are given an opportunity to appear and make an oral or written statement to their ARB. *See id.* ¶ 2c. No witnesses are allowed to testify, but detainees may provide other documents directly to the ARB or via their AMO. *See id.* ¶ 2d; Hecker Dec. ¶ 3e. Each session is recorded and a transcript is created, if the detainee was present. *See* Implementation Mem., Encl. (4) ¶ 2b; Hecker Dec. ¶ 3f. Members of the press have attended some ARBs. *See id.* ¶ 3e.

After a session, the ARB meets privately and votes to recommend whether the detainee should be released, transferred, or further detained. *See* Implementation Mem., Encl. (4) ¶¶ 2g; 3a-b. The ARB prepares a record of the entire proceeding. *See id.* ¶ 3c. The ARB then submits the assessment, the record, and its recommendations (collectively the "ARB Record") to the Designated Civilian Officer ("DCO"), *see id.* ¶ 3d, the person designated by the Secretary of Defense to operate and oversee the administrative review process, *see* Wolfowitz Order ¶ 2B. The submission of the ARB Record is accomplished through the Director of the Office of Administrative Review of the Detention of Enemy Combatants, who attaches an "Action Memo" to the ARB Record summarizing the proceedings. *See, e.g.*, Rappaport Dec. Ex. F. Finally, based on this written record, "[t]he DCO decides whether to release, transfer with conditions, or continue to detain the enemy combatant." Implementation Mem., Encl. (4) ¶ 5c; *see also* Wolfowitz Order ¶ 3E(v); Hecker Dec. ¶ 3h.

From December 14, 2004 to December 23, 2005, the ARB process was completed for 463 detainees. *See* Rappaport Dec. Ex. G. The DCO made "final decisions" on all ARBs, deciding to release 14 detainees, transfer 120, and continue to detain 329. *Id.* An additional 18 ARB proceedings have been completed as of February 20, 2006. *See id.* Ex. H.

Once the DCO has made his final decision, he has authority to "coordinate" within DOD and with the Department of State and Department of Homeland Security (if necessary) "to implement any enemy combatant release or transfer according to established Deputy Secretary of Defense Policy." Implementation Mem., Encl (4) ¶ 5d. As of February 22, 2006, 20 detainees had been physically released or transferred through the ARB process. *See* Hecker Dec. ¶ 3o.

The DCO has decided to release or transfer 130 more detainees, pending coordination with foreign governments. *See id.*

B. AP's FOIA Request and DOD's Response

Two AP requests remain at issue: On November 16, 2004, AP submitted a FOIA request that included specific requests for records of (1) disciplinary actions initiated since January 2002 as the result of an allegation of mistreatment at Guantanamo, and (2) allegations of detainee-against-detainee abuse. *See* Rappaport Dec. Ex. A. On January 18, 2005, AP submitted a related FOIA request seeking (1) transcripts of testimony given at the ARBs, (2) documents provided by detainees to their AMOs for use at the ARB proceedings, and (3) details of the release or transfer detainees and the reasons for DOD's actions. *See* Rappaport Dec. Ex. B.

Only after this lawsuit was filed did DOD produce anything to AP. Its initial production of some 1400 pages included heavily redacted copies of: (1) the transcripts of 85 ARBs that had been held as of June 6, 2005; (2) correspondence between two detainees and their families that the detainees had provided to their AMOs and were presented to the ARBs; (3) Action Memos for 23 detainees that the DCO had decided to release or transfer, along with the associated ARB Record; (4) eight files of disciplinary actions that resulted from allegations of abuse by DOD personnel against detainees; and (5) 20 "Detainee Reports" of altercations between detainees from DIMS, and records concerning four allegations of threats of harm made by detainees during CSRTs.

DOD redacted a great deal of information from these documents. Initially, DOD redacted all identifying information about detainees and third parties mentioned in the documents. *See* Hecker Dec. ¶ 15a. Following the Court's Orders of January 4 and January 23, 2006 in the CSRT case, and the Solicitor General's decision not to appeal them, DOD agreed to release detainees' names and identifying information in nearly all the ARB transcripts and related documents. *See* Defendant's memorandum in support of summary judgment, dated February 22, 2006 ("DOD Mem.") at 15-16. DOD, however, continues to withhold detainee identifying information from other documents:

- DOD is withholding detainee identifying information contained in the records of disciplinary actions arising from allegations of detainee abuse by DOD personnel, and from documents concerning detainee-against-detainee abuse, on the ground that this information lies within the privacy provision of Exemption 6, which permits an agency to withhold "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6), and the law enforcement provision of Exemption 7(C), which permits an agency to withhold records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of privacy," 5 U.S.C. § 552(b)(7)(C). *See* Hecker Dec. ¶¶ 17, 19; DOD Mem. at 23-27.

- DOD is withholding detainee identifying information contained in the Action Memos and other documents reflecting the ARB assessment and the DCO decision to release or transfer. DOD primarily asserts that it may withhold this information under a deliberative process privilege recognized by FOIA's Exemption 5. *See* Hecker Dec. ¶ 16c; DOD Mem. at 29-33. DOD also claims that this information is protected under FOIA's Exemption 6. *See* Hecker Dec. at 16b; DOD Mem. at 34.

- DOD is withholding information identifying the members of two detainees' families from the correspondence submitted to the ARBs. *See* Hecker Dec. ¶ 15. DOD argues that this information may be withheld under Exemption 6 and purports to make the particularized showing this Court has said is required under that Exemption. *See* Hecker Dec. ¶¶ 15c-d; DOD Mem. at 27-29; Jan. 4 Order at 6 n.3.

As demonstrated below, DOD has no proper basis to withhold identifying information concerning detainees or their families in these three categories of documents.[1]

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[1] AP does not challenge other information withheld by DOD on grounds of national security under FOIA Exemption 1, or because information is "classified" and therefore within Exemption 3. Nor does AP now contest DOD's withholding on privacy grounds of the identities of DOD personnel contained in the documents that have been produced. *See* Rappaport Dec. ¶ 4.

ARGUMENT

I.
DOD HAS FAILED TO ADEQUATELY SEARCH FOR RECORDS REGARDING THE RELEASE OR TRANSFER OF DETAINEES

In seeking summary judgment, DOD has laid out for the first time the scope of its search for documents. On its face, DOD's description of the search it made to find records providing "[d]etails and explanations of the decisions made to release or transfer detainees, including the reason why the decision was made," suggests the search was incomplete. DOD acknowledges that many detainees were not eligible for the ARB process, including detainees "who had already been approved for transfer" before the ARB process was created. Hecker Dec. at 11 n.5. Yet, DOD's search for documents concerning any "decision to release or transfer detainees" was apparently limited to a search of the records generated through the ARB process. *See* Hecker Dec. ¶¶ 4-5. As a result of this narrow search, DOD only produced records of 23 decisions to release or transfer a detainee. *See id.* at ¶ 5f. Yet, as of June 6, 2005, the date on which DOD searched its records, at least 234 detainees apparently had been transferred or released from Guantanamo. *See* Rappaport Dec. Ex. I. A government agency's search for records responsive to a FOIA request must be "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). DOD's search failed to locate records concerning more than 200 detainees, and was thus inadequate.

II.
DOD BEARS A HEAVY BURDEN TO WITHHOLD INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

The purpose of FOIA, the Court of Appeals has repeatedly affirmed, is "to promote honest and open government and to assure the existence of an informed citizenry [in order] to hold the governors accountable to the governed." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005) ("*La Raza*") (internal quotation and citation omitted). The

Supreme Court is equally explicit in describing the basic purpose of FOIA: "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

The Act accomplishes this goal by adopting "as its most basic premise a policy strongly favoring public disclosure of information in the possession of federal agencies." *Halpern v. FBI*, 181 F.3d 279, 286 (2d Cir. 1999). "[D]isclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). The Act is broadly conceived because access to information about government is "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

FOIA requires that each agency of the federal government make its records "promptly available to any person," 5 U.S.C. § 552(a)(3), "unless its documents fall within one of the specific, enumerated exemptions set forth in the Act," *La Raza*, 411 F.3d at 355. "Consistent with FOIA's purposes, these statutory exemptions are narrowly construed." *Id.* at 355-56; *see also U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (FOIA "exemptions have been consistently given a narrow compass"). District courts are to review *de novo* all claims of exemption advanced by an agency and, if necessary, examine records *in camera* to determine if the statutory exemptions have properly been invoked. *See, e.g.*, *King v. U.S. Dep't of Justice,* 830 F.2d 210 (D.C. Cir. 1987).

On such judicial review, the agency bears the burden of justifying its decision to withhold any requested information. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352 (1979). Summary judgment is appropriate in a FOIA case, as in any other, only if the moving party proves that there are no material facts in dispute and it is entitled to judgment as a matter of law. *Halpern*, 181 F.3d at 287-88. To meet this standard, DOD must prove that the specific redactions it has made to records sought by AP are expressly authorized by a FOIA exemption. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

III.
EXEMPTIONS 6 AND 7 DO NOT AUTHORIZE DOD TO WITHHOLD IDENTIFYING INFORMATION IN RECORDS OF DETAINEE ABUSE

DOD begins this litigation from the same place it started in the CSRT case: asserting a privacy interest on behalf of individuals it has imprisoned without charge for several years, and claiming that this alleged privacy concern outweighs any public interest in disclosure of information essential for the public to understand fully what its government is up to. Again, DOD has failed to demonstrate that the detainees have any reasonable expectation of privacy in records sought by AP. Even if DOD could establish some modicum of a privacy interest in records concerning instances of alleged abuse, it has not shown that this interest outweighs the substantial public interest in disclosure.

A. Nature and Scope of DOD's Authority to Withhold Information Under Exemptions 6 and 7(C)

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Similarly, Exemption 7(C) permits an agency to withhold records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C). Although public disclosure is "more difficult to obtain" when the government relies on Exemption 7(C) rather than Exemption 6, *FLRA v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992), both require the asserted privacy interest to be weighed against the public interest in disclosure.

Whether a disclosure would amount to an unwarranted invasion of personal privacy turns on "the nature of the requested document" and its relationship to FOIA's core purpose of opening agency action "to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (internal quotations and citation omitted). In *Reporters Committee*, the Supreme Court explained that Exemption 7(C) allows information to be withheld only when it "reveals little or nothing about an agency's own conduct." *Id.* at 773. On the other hand, even personal information about an individual must be revealed when that disclosure advances FOIA's purpose of informing citizens about "'what their government is up to'":

> Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct.

Id. (citation omitted).

The same analysis used by the Court in the CSRT case applies here. Information may be withheld only when it relates to a private individual and its disclosure would not assist the public in understanding the actions of government. *See* Jan. 26 Order at 13-14 & n.6. In this case, DOD's redaction of identifying information from official records of investigations into detainee abuse is improper given DOD's failure to demonstrate that the detainees had a reasonable expectation of privacy in the information, and given the significant public interest in information about alleged detainee mistreatment.

B. DOD Has Not Established that the Detainees Have a Reasonable Expectation of Privacy in this Information

As the Court concluded in its January 23, 2006 Order, the concept of a reasonable expectation of privacy, meaning "a zone (whether spatial, informational, or whatever) into which a reasonable person neither wishes nor expects outsiders to intrude," can be used as an operative definition in the context of FOIA's privacy exemptions. *Id.* at 8. Based on this, the Court held that neither the detainees themselves, nor their families, friends, and associates, had a reasonable expectation of privacy in the identifying information about them in the CSRT transcripts and associated documents. DOD's contention here – that the detainees have a reasonable expectation of privacy in identifying information in records of detainee abuse – fares no better.[2]

1. Disciplinary Records Related to Allegations of Detainee Abuse

It is hard to imagine that a detainee would have any expectation of privacy in his interactions with DOD personnel while imprisoned at Guantanamo. It is harder still to conceive that any expectation of privacy could extend to facts surrounding his alleged abuse by DOD guards. If detainees have no reasonable expectation of privacy in the fact that the United States is holding them as enemy combatants, or in information they provide to CSRT or ARB hearing officers, s*ee* Jan. 4 Order at 4-6, it would be incongruous indeed for them to have a reasonable expectation of privacy in the fact that, while imprisoned, they were subject to abuse by their captors.

Nevertheless, DOD asserts that the detainees have a privacy interest in preventing disclosure of their identities in disciplinary records relating to alleged mistreatment of detainees by military personnel, because release would subject the detainee "to public scrutiny as victims of alleged abuse." DOD Mem. at 23. DOD notes that Congress and the courts have recognized that victims of crime have a privacy interests that may prevent disclosure of certain judicial

[2] DOD asserts that the Court incorrectly considered a detainee's "reasonable expectation of privacy" in applying the FOIA exemption. DOD Mem. at 24. Its argument misunderstands both the Court's decision and the law. The Court did not hold that a person's reasonable expectation of privacy under the Fourth Amendment is coterminous with the privacy interest protected by FOIA. Rather, it found, as has the Supreme Court, that it is "useful to employ the expectation of privacy concept in certain civil cases involving informational privacy." Jan. 23 Order at 8 (*citing Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977)). Other courts similarly have employed this concept in Exemption 6 and Exemption 7(C) contexts. *See, e.g.*, *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) (Exemption 6); *Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 346 (D.C. Cir. 1987) (Exemption 7(C)).

records, *id.* at 25, but detainees are not in the same posture as innocent victims of crime in the general public. As a matter of law, prisoners have little or no expectation of privacy for most occurrences on prison grounds. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) ("we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell"); *United States v. Willoughby*, 860 F.2d 15, 21 (2d Cir. 1988) (no reasonable expectation of privacy in telephone calls made in prison).[3]

Nor has DOD provided anything more than speculation that the detainees actually expect or want to keep private allegations that they have been abused. In fact, there is evidence that both current and former detainees are seeking to publicize the conditions at Guantanamo, including their allegations of abuse. For example, three former detainees issued a 115 page report in 2004 alleging they were beaten and otherwise mistreated while at Guantanamo. *See* Glenn Frankel, *Three Allege Guantanamo Abuse*, Wash. Post, Aug. 5, 2004, at A12. Others have conveyed allegations of abuse to the public through their attorneys. *See* Josh White, *Guantanamo Desperation Seen in Suicide Attempts*, Wash. Post, Nov. 1, 2005, at A1. Many current detainees have participated in hunger strikes to protest alleged abuse. *See* Letta Tayler, *New Allegations Of Abuse*, Newsday, Oct. 27, 2005, at A23.

Even if it were conceivable that a detainee had some reasonable expectation of privacy in an event that occurred at Guantanamo, that expectation would not extend to statements made *by others* about that incident. The Court addressed this issue in its January 23 Order. There, DOD

[3] All of the cases cited by DOD involved privacy claims by members of the general public and not prisoners, and are therefore inapposite. *See, e.g.*, *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991) (former Haitian refugees); *Rose*, 425 U.S. 352 (Air Force cadets); *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987) (patent attorney); *Ligorner v. Reno*, 2 F. Supp. 2d 400 (S.D.N.Y. 1998) (attorney); *United States v. Amodeo*, 44 F.3d 141 (2d Cir. 1995) (law firm).

claimed that the family, friends, and associates of a detainee – third parties to the CSRTs – had an interest in keeping their identities private. The Court, however, concluded that

> [A]ny reasonable expectation of these third parties that the identifying information provided by the detainees would remain private is even more conjectural than that of the detainees themselves. It is theoretically possible, of course, that the family of a detainee may not want his, or their, names and whereabouts revealed because of fear of embarrassment or retaliation; but how can this be said to be a privacy interest, when they never had any reasonable expectation that the detainee and/or his captors would not reveal his and their names?

Jan. 23 Order at 12 (*citing Smith v. Maryland*, 442 U.S. 735, 745 (1979)). Here, the detainees are the third parties vis-à-vis the disciplinary records. While the documents address allegations of abuse against detainees, they are comprised almost entirely of statements by DOD personnel who witnessed the incident and the conclusions and responses of superior officers. *See, e.g.*, Heckler Dec. ¶ 8; Rappaport Dec. Ex. J.[4]

A review of any of the disciplinary records at issue demonstrates how little an expectation of privacy the detainees have in this information. For example, one of the disciplinary actions recounts an incident in which a detainee's cell door was left unlocked, who then rushed out and tried to lock four guards in another cell. *See* Rappaport Dec. Ex. J. After the detainee was caught and shackled, a guard that the detainee bit during the melee punched him. *See id.* Because this incident took place in a prison, the detainee would not have a reasonable expectation of privacy in information about it. Nor would it be reasonable for the detainee to expect that his identity would not be revealed in DOD's investigation of the incident. Another disciplinary record concerned an allegation of abuse that occurred during an interrogation of a

[4] DOD asserts that some of the documents produced are medical records in which the detainees have a heightened privacy interest. *See* DOD Mem. at 23. However, AP is aware of only four pages of medical records that were produced, which pertain to one detainee. *See* Rappaport Dec. Ex. K at 1347-50.

detainee – a setting in which it is nearly impossible to believe the detainee had an expectation of privacy. *See* Rappaport Dec. Ex. K. Not only are interrogations designed to extract information from the detainee that would be shared with others, but the detainee would correctly expect that the session was being observed by others and recorded. *See id.*[5]

2. Records of Detainee-Against-Detainee Abuse

For similar reasons, the detainees do not have a reasonable expectation of privacy in their identities as to records of detainee-against-detainee abuse. Again, as prisoners at Guantanamo, the detainees have little or no expectation of privacy in events that occur there. Nor do they have an expectation of privacy that statements by others about incidents involving altercations between detainees. As to these records, DOD similarly asserts that releasing the name of an alleged aggressor would invade his personal privacy because the public and his family would learn that he had engaged in abusive behavior towards another detainee. *See* Hecker Dec. ¶ 19b. However, it is even less reasonable for an alleged perpetrator of an abusive act to have a reasonable expectation of privacy in his activities than an alleged victim. In either case, DOD has failed to demonstrate that the detainees had a reasonable expectation of privacy.

C. Any Reasonable Expectation of Privacy is Outweighed by the Public Interest in Disclosure

Even if DOD could show that the detainees have some interest in keeping their identities private, the public interest in disclosure would outweigh any such interest. As in the CSRT case, DOD is incorrect in claiming that the public's ability to evaluate the allegations of detainee abuse is not impaired by the redactions. Public disclosure of the identifying information being

[5] DOD argues that the Court's previous reasoning about the detainees' privacy expectations are not applicable here because none of the documents involve quasi-judicial proceedings. DOD Mem. at 24-25. While this may be a factual difference, it is beside the point. That the records concerning abuse do not share the characteristics of a CSRT or an ARB does not mean that the detainees have a reasonable expectation of privacy in them.

withheld by DOD is important if the public is to "'hold the governors accountable to the governed.'" *La Raza*, 411 F.3d at 355 (citation omitted).

The redacted disciplinary action documents are comprised primarily of statements by the member of the military who is the subject of the investigation and DOD personnel who were witnesses, conclusions of the investigating officer, and a record of the disciplinary action taken. These records provide an account of the incident of alleged abuse from the standpoint of DOD and its personnel. What is entirely absent, however, is the detainee's version of events. *See, e.g.*, Rappaport Dec. Exs. E, J, K. It is impossible to tell from the records whether detainees were never questioned about the abuse, or if this information was not recorded, but in either case the detainee's account is not presented. The documents produced tell only one half of the story.[6]

The public has a strong interest in learning what actually transpired. A complete recounting of the incident will allow the public to evaluate whether or not detainee abuse occurred, and analyze whether DOD's responses were appropriate. The only way to accomplish this, however, is to get the detainee's side of the story. If a detainee has been released and his identity is known, AP can seek an interview; if the alleged victim of abuse is still detained, questions can be transmitted through his attorney. In either case the refusal to provide the name is a complete block to public knowledge and understanding.

In the CSRT case, the Court indicated that a public interest exists in being able to follow-up assertions made in DOD documents. While the Court did not reach the question of public interest in the January 23 Order because DOD failed to demonstrate a privacy interest at all, it did note that the case made for the public benefit to disclosure "appears to be a strong one." Jan.

[6] A few of the Detainee Reports concerning detainee-against-detainee incidents contain information from detainees themselves, as provided through translators and recorded by the guards. This information is rare in the reports, and it is filtered through a DOD translator and the DOD personnel who recorded it.

23 Order at 14 & n.6. As an example, the Court observed that several of the detainees, in denying that they were enemy combatants, testified that there were people in their home villages who could attest to their innocence. *See id.* at 14 n.6. If the names of the villagers and the friends were redacted, the Court asked, "how could the Associated Press evaluate that the tribunal was taking reasonable steps to follow-up on these assertions?" *Id.*

This same reasoning applies here. If the names of the detainees who were allegedly abused are withheld, there is no way for the public to gain a more complete understanding of the incidents. Identifying information about the detainees allows the public to seek out details of the alleged abuse, and to develop information needed to understand and evaluate DOD's disciplinary decisions. This information will "shed light on an agency's performance" of its duties and "falls squarely within" the statutory purpose of FOIA, and thus may not properly be withheld. *Reporters Committee*, 489 U.S. at 773. The detainee identifying information in documents concerning allegations of abuse should probably be produced.[7]

IV.
EXEMPTION 5 DOES NOT AUTHORIZE DOD TO WITHHOLD IDENTIFYING INFORMATION CONTAINED IN THE WRITTEN RECORD OF A DECISION TO RELEASE OR TRANSFER A DETAINEE

While DOD has decided to release or transfer hundreds of individuals imprisoned at Guantanamo, including 150 as a result of the ARB process, it has refused to disclose their names. DOD asserts that the deliberative process privilege permits it to withhold detainee identifying information contained in the records of its decisions to release or transfer a detainee, but its position is contrary to law.

[7] Since only a handful of detainees are involved in abuse allegations, if any uncertainty exists about whether the detainees have an actual expectation of privacy, the Court could require DOD to inquire of them – as it did in the CSRT case – to determine their intent to keep their identity secret.

A. Nature and Scope of DOD's Authority to Withhold Information Under the Deliberative Process Privilege

Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption encompasses traditional common-law privileges against disclosure, including the deliberative process privilege. *See La Raza*, 411 F.3d at 356. This privilege "is designed to promote the quality of agency decisions by preserving and encouraging candid discussion between officials." *Id.*; *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). There are at least three ways that the privilege protects and promotes government decision making processes:

> It serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's actions.

Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (citations and quotations omitted). The object of the privilege, in short, "is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (citations and internal quotations omitted).

For this privilege to apply, information must be both "predecisional" and "deliberative." *La Raza*, 411 F.3d at 356. Documents are predecisional when they are "prepared in order to assist an agency decisionmaker in arriving at his decision," *id.* (citations and internal quotations omitted), or when they contain "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Tigue*, 312 F.3d at 80 (citation and quotation omitted). On the other hand, documents that reflect or establish an agency's legal position – that "are the law itself" – are not predecisional and are not exempt from disclosure. *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 679 (D.C. Cir. 1981) (citation omitted); *see also, e.g.*, *Tax Analysts v. IRS*, 294 F.3d 71, 80 (D.C. Cir. 2002) ("*Tax Analysts II*") (the privilege does not apply to "final statements of agency policy or to statements that explain actions that an agency has taken"). "[It is] difficult to see how the quality of the decision will be affected by forced disclosure" of a document that is prepared after a decision had been made, and thus it is not protected by the privilege. *Sears*, 421 U.S. at 151.[8]

A record is deliberative if it is "actually . . . related to the process by which policies are formulated." *La Raza*, 411 F.3d at 356 (citations and internal quotations omitted). This requirement focuses on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Sears*, 421 U.S. at 150 (citations and internal quotations omitted); *see also Grand Cent. P'ship, Inc.*, 166 F.3d at 482. To be deliberative, a document must "reflect[] the give-and-take of the consultative process . . . weighing the pros and cons of agency adoption of one viewpoint or another." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *see also, e.g.*, *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997) ("*Tax Analysts I*"); *Lee v. FDIC*, 923 F. Supp. 451, 456 (S.D.N.Y. 1996).

[8] Indeed, FOIA requires agencies to make public "final opinions . . . made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A). Exemption 5 does not apply to these final opinions. *Sears*, 421 U.S. at 153. Even for documents that are not technically encompassed by this section because they do not "effect 'a final disposition,'" the Supreme Court has instructed that courts "should be reluctant to . . . construe Exemption 5 to apply" to such agency decisions. *Id.* at 153, 160.

Even in a deliberative document, the privilege does not, in general, protect the discussion of "purely factual" matters, because those do not reflect the agency's deliberative process. *See Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988); *see also Hopkins v. HUD*, 929 F.2d 81, 85 (2d Cir. 1991). "Thus, factual findings and conclusions, as opposed to opinions and recommendations are not protected." *Reino De Espana v. American Bureau of Shipping*, 2005 WL 1813017, at *11 (S.D.N.Y. Aug. 1, 2005) (citations and internal quotations omitted). Only factual discussions that are "inextricably intertwined" with a document's presentation of opinions may be withheld. *Hopkins*, 929 F.2d at 85.

Courts consider a variety of factors to determine whether a document is both predecisional and deliberative:

- Timing. A document may be predecisional if the agency can "pinpoint" the specific decision to which it correlates and can demonstrate that the document chronologically preceded the decision. *Grand Cent. P'ship, Inc.*, 166 F.3d at 482. Relevant factors include whether a document "formed an essential link in a specified consultative process," reflects the "personal opinions of the writer rather than the policy of the agency," or would "inaccurately reflect or prematurely disclose the views of the agency" if released. *Id.* (citations and internal quotations omitted).

- Authors and Recipients. The identity and position of both the author and any recipients are significant indicia of whether the deliberative process privilege applies. *See Ethyl Corp. v. U.S. EPA*, 25 F.3d 1241, 1249 (4th Cir. 1994) (*quoted* in *Grand Cent. P'Ship, Inc.*, 166 F.3d at 482). A document is not likely to be predecisional if it is issued by a person with decision-making authority over the question. *See, e.g.*, *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 147 (2d Cir. 1994) (privilege applies where author did not have final decision-making authority); *Taxation with Representation Fund*, 646 F.2d at 679-80.

- Tone. Courts commonly consider the "tone" of a document is assessing whether it is "deliberative." A document that uses a "declaratory tone" indicates that it is not predecisional and deliberative. *Id.*; *see also Tax Analysts II*, 294 F.3d at 81 (documents stating "[w]e conclude" and "[i]t is the position of the Treasury Department that . . ." not covered by the privilege); *Fulbright & Jaworski v. Dep't of the Treasury*, 545 F. Supp. 615, 621 (D.D.C. 1982) (releasing document "written in an authoritative manner" by "an individual at the top of the chain of command"). On the other hand, documents that use phrases such as "we believe" or "we suggest" are more likely to be deliberative. *See Tax Analysts II*, 294 F.3d at 81.

Weighed against these controlling criteria, the records of a DCO's decision to release or transfer a detainee are plainly outside the scope of the deliberative process privilege claimed by DOD.

B. Detainee Identifying Information in Documents Determining Their Release or Transfer Is Neither Predecisional nor Deliberative

The records documenting a decision to release or transfer a detainee are not "predecisional," and detainee identifying information contained in such documents is not "deliberative." The withheld information is purely factual, and withholding it would not promote the kind of frank and open discussion the deliberative process privilege seeks to protect.

1. The DCO's Decision to Release or Transfer a Detainee is not "Predecisional."

DOD argues that the DCO's "initial determination that a detainee should be transferred from Guantanamo" is predecisional because "the ultimate determination to transfer a detainee is not final" until the government receives the necessary assurances from the receiving country. DOD Mem. at 30, 32-33. The contention that records of the decisions to release or transfer specific detainees are predecisional simply because they are followed by a diplomatic process necessary to implement the decision is not supported by either DOD's relevant procedures or applicable law.

First, the procedures promulgated by DOD to implement the DCO's decision to release or transfer a detainee belie its characterization of the decision as a preliminary step in the process. DOD's regulations provide that at end of the ARB process, "[t]he DCO *decides* whether to release, transfer with conditions, or continue to detain the enemy combatant." Implementation Mem., Encl. (4) ¶ 5c (emphasis added). Next, the DCO must "notify the Secretary of Defense of *his decision*" and "*coordinate* within DoD and with the DOS and DHS (if necessary) *to* *implement* any enemy combatant release." *Id.* ¶ 5d (emphasis added). Plainly, these procedures do not contemplate that the DCO's decision is simply a preliminary recommendation. To the contrary, the procedures empower the DCO with final authority to determine whether a detainee is released or transferred, and establish a subsequent process of coordination with other agencies "to implement" that determination.[9] The details of this later process, laid out in detain in the Hecker Declaration and the Declarations of Matthew Waxman and Pierre-Richard Prosper, are beside the point.

Second, as a matter of law, a decision to act does not become "predecisional" for purposes of the privilege just because it is followed by steps required to implement it, even if the subsequent steps require additional decisions. *See, e.g.*, *Taxation with Representation Fund*, 646 F.2d at 677 (Exemption 5 does not protect "communications that implement an established policy of an agency"); *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 47 (N.D.N.Y. 1991) (ordering disclosure of a document that "appears to be 'the application and implementation of the established policies'") (citation omitted). For example, *Tax Analysts I* involved "Field Service Advice" memoranda ("FSAs") issued by IRS attorneys in response to legal questions submitted by IRS field personnel. 117 F.3d at 617. While the FSAs represented the agency's legal position, they were not binding on field personnel in addressing a particular taxpayer's case. *Id.* Nevertheless, the FSAs were not predecisional: "Although the FSAs may precede the field office's decision in a particular taxpayer's case, they do not precede the decision regarding the agency's legal position." *Id.*; *see also, e.g.*, *Tax Analysts II*, 294 F.3d at 81 (rejecting IRS argument that memoranda similar to FSAs were predecisional because field personnel made the "final decisions about their programs"); *Evans v. U.S. Office of Personnel Mgmt.*, 276 F. Supp. 2d 34, 40 (D.D.C. 2003).[10]

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[9] Similarly, DOD's motion papers mostly describe the DCO action as a "decision" or "determination," and the subsequent effort to implement that decision as "effectuating" that decision. *See, e.g.*, Hecker Dec. ¶ 3j.

So also here. While the DCO's decision may precede the ultimate decision on how to release or transfer a detainee, it does not precede the decision to act. Put another way, two separate decisions are being made here. The DCO first supervises a quasi-judicial process that results in a decision whether a detainee *should* be released or transferred. If that decision is affirmative, the DCO undertakes a second process to decide whether release of the detainee *can* be secured. Coordinating with the State Department and others to try to implement the decision to release or transfer a detainee does not make the first decision "predecisional" or otherwise within the deliberative process privilege. Nor is a DCO's decision rendered "pre-decisional" just because it could be changed before it is fully implemented. If this were so, virtually all government decisions would be predecisional and exempt from disclosure. In *Manzi v. DiCarlo*, for example, the court rejected the government defendants' argument that because the allocations for state senators' office expenditures are not final until the funds are actually spent, documents describing the allocations were predecisional:

> This argument is based on the simplistic proposition that no decision can be final if there is a possibility that it can be changed. No decision applying the deliberative process privilege supports such a broad rule which would effectively enable governmental officials to shield documents relating to any decisions that are subsequently modified or overruled.

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[10] Cases holding that documents generated following an initial decision are protected by the deliberative process privilege generally involve decisions to pursue very broad policies. *See Sierra Club v. U.S. Dep't of Interior*, 384 F. Supp. 2d 1, 16 (D.D.C. 2004) (decision to seek passage of legislation by Congress); *Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba*, 624 F. Supp. 572, 574 (D.D.C. 1984) (decision to pursue radio broadcasting to Cuba).

982 F. Supp. 125, 131 (E.D.N.Y. 1997); *see also Coastal States Gas Corp.*, 617 F.2d at 860 (decisions that could be amended or rescinded not predecisional).

2. Detainee Identifying Information is not "Deliberative"

Even if the DCO's decision could somehow be considered predecisional, detainee identifying information contained in the records of his decision is not "deliberative" and therefore not exempt from disclosure. The information that DOD seeks to withhold is purely factual, and not so "inextricably intertwined" with protected opinions and recommendations as to be protected. The specific names of the detainees do not represent an "opinion" that could be inhibited if released, and can have no conceivable impact on the "give-and-take" of the policymaking process. Given that the rationale of the privilege is to protect frank and open discussion so as to promote the quality of agency decisions, the absence of any evidence that the decision making process would be inhibited by the release of detainee names is fatal to DOD's claim of privilege. *See, e.g.*, *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1090-91 (9th Cir. 2002); *Allocco Recycling Ltd. v. Doherty*, 220 F.R.D. 407, 412-13 (S.D.N.Y. 2004).

3. None of the Other Indicia of Privilege are Present

The DCO's decision that a detainee should be released or transferred bears none of the other hallmarks of a record that is deliberative and predecisional. First, the DCO has final policymaking authority over whether to release, transfer, or continue to detain an enemy combatant. *See, e.g.*, Implementation Mem., Encl. (4) ¶ 5c. Second, there is no evidence that these memoranda are even sent to the other agencies involved in making arrangements for the release or transfer of a detainee, but even if they were, the flow of information would only be "horizontal" between agencies. *See Tax Analysts II*, 294 F.3d at 81; *Evans*, 276 F. Supp. 2d at 40 (information transferred "horizontally" between agencies less likely to be pre-decisional). Third, the tone of the DCO's contribution to the memoranda – asserting his decision by initialing next to the appropriate entry – is declaratory, not advisory. *See* Rappaport Dec. Ex. F.

DOD argues that releasing detainee identifying information would prematurely disclose *proposed* policies before they were finally formulated or adopted, but this simply conflates the two separate decisions to release a detainee and how to execute that release. AP seeks only identifying information about detainees that DOD has specifically decided should be released or transferred, a policy that has been fully formulated. As in *Tax Analysts I*, "there is nothing premature or misleading about disclosing" a decision that has yet to be implemented by other personnel. 117 F.3d at 618. DOD's other arguments for withholding the identifying information in the records of the DCO's decision, even if valid, are irrelevant to the deliberative process privilege.[11]

C. Exemption 6 Does Not Justify Withholding Identifying Information in Records of Decisions to Release or Transfer a Detainee

In addition to asserting the deliberative process privilege, DOD claims that the names of detainees in the transfer or release documents are protected under Exemption 6. In this regard, DOD primarily rehashes general arguments rejected in the CSRT litigation that disclosure could theoretically subject the detainees and their family members to harm. DOD also argues that the danger is exacerbated by disclosure of identities close to the date on which they might be released or transferred, *see* DOD Mem. at 34; Hecker Dec. ¶ 16d, and contends that disclosing the identity of a detainee who has already been released raises safety and security concerns

[11] *See* DOD Mem. at 31, 33 (release could harm the government's ability to obtain assurances from foreign countries on transfer; DOD does not unilaterally release information about which detainees have been approved for transfer or release; disclosure raises security concerns at Guantanamo).

regarding their ability to assimilate back into the society or legal systems of their countries, *see id.* 3n.

As in the CSRT case, DOD makes no factual showing that disclosure in any particular case creates a specific concern. Rather, it again relies upon non-particularized speculation of the type the Court previously found insufficient to demonstrate a privacy interest protected by Exemption 6. *See* Jan. 4 Order at 5; Jan. 23 Order at 13. In addition, as in the CSRT case, it might be considered "strange, even hypocritical, that the military officials who held the detainees incommunicado for so many months now express such solicitude for the detainees' privacy rights." *See* Sept. 26 Order at 1. It is, again, "hard to escape the inference that the Government's entire Exemption 6 argument is a cover for other concerns." *See* Jan. 23 Order at 10 n.2.

No proper basis exists to withhold detainee identifying information from the records of decisions to release or transfer a detainee, and they should be released. Without this information it is impossible for the public to match the records of specific CSRT and ARB proceedings with any subsequent recommendation to release or transfer. Public knowledge about the basis for the government's actions, whether rules are being consistently applied, and whether detainees are being sent where they will be treated humanely, is all significantly restricted by the refusal to identify detainees who are to be released or transferred as a result of the ARB process.

V.
DOD HAS FAILED TO SHOW THAT EXEMPTION 6 AUTHORIZES WITHHOLDING IDENTIFYING INFORMATION IN CORRESPONDENCE FROM DETAINEE FAMILY MEMBERS SUBMITTED TO ARBS

In the CSRT case, the Court concluded that DOD's "wholly conclusory and grossly speculative assertions" that the detainees or their families and friends would be put at risk of harm if identifying information about them were revealed did not satisfy its burden under Exemption 6 to show that disclosure would constitute a clearly unwarranted invasion of personal privacy. Jan. 23 Order at 13; *see also* Jan. 4 Order at 5-6. The Court allowed, however, that "[i]t is conceivable that in the particular circumstances of a particular detainee, [DOD] could meet this burden with respect to some particular items of the redacted information." *Id.* at 6 n.3. Now, DOD contends that it has met this burden as to letters sent to two detainees that were submitted to ARBs. However, DOD has provided no evidence that the family members who sent the letters have any reasonable expectation that their identities will be kept private, or that there is any likelihood that the statements made by the detainees in the ARBs would expose their families to harm.

As discussed above, the Court held in the CSRT case that family members mentioned during the CSRT hearings "never had any reasonable expectation that the detainee and/or his captor would not reveal his and their names[.]" Jan. 23 Order at 12. The only evidence DOD offers that the two families now at issue are in any different posture is a comment by one of the detainees that it is "a big shame in our culture to read my wife's letter to you." Hecker Dec. Ex. 7 at 907. From this, DOD extrapolates that her privacy concerns would be implicated by the release of her name and address. *See* Hecker Dec. ¶ 15d. DOD's conclusion is, at most, nothing more than the kind of speculation and conjecture the Court rejected in the CSRT case. "[A] person has no legitimate expectation of privacy in information he voluntarily turns over the third parties," *Smith*, 442 U.S. at 743-44, and an alleged cultural reluctance does not alter that.

Moreover, DOD's evidence that these particular detainee families would be put at risk of harm if their identities are disclosed is once again entirely speculative and conclusory. To demonstrate that disclosure "would constitute a clearly unwarranted invasion of personal privacy," DOD must provide proof that the families have a reasonable fear that they would face retaliation if their identities were know. As the Court previously noted, in *U.S. Dep't of State v.*

Ray, 502 U.S. 164 (1991), the fear of harm was so well founded that the U.S. government demanded that Haiti not retaliate against the returned refugees and their families, and monitored the situation by interviewing the returned Haitians under strict promises of confidentiality. *See* Jan. 4 Order at 5. There is no reason to believe that the families of the detainees fear retaliation at all, let alone anything close to the level of fear in *Ray*.

DOD bases its contention that one family could be exposed to harm entirely on the detainee's statement to the ARB that he was a driver for a Taliban leader only because he needed money for medical treatment. *See* Hecker Dec. ¶ 15b(1). According to DOD, the transcript thus suggests that the detainee cooperated with the ARB, which it claims is likely to be perceived by members of the Taliban "as hostile and even traitorous." *Id.* ¶¶ 15b(1), 15c. This assertion defies common sense and lacks support in DOD's evidence. A review of the transcript reveals no suggestion that the detainee "cooperated" with the ARB in some way that theoretically might be perceived as traitorous. *See* Hecker Dec. Ex. 6. The detainee did not provide any intelligence or other information to the ARB; to the contrary, the majority of the transcript concerns the detainee's claim that he is a victim of mistaken identity. *See id.* Nor is there any reason to believe this comment would be perceived by the Taliban as traitorous. By DOD's standard, any statement that a detainee worked for the Taliban for any reason other than that he agreed wholeheartedly with their ideology would put him and his family in danger of retaliation. Finally, DOD has not provided any direct evidence of fear of harm, such as requests by the detainee or his family to keep their identities private.

For many of the same reasons, DOD's contention as to the second detainee's family fares no better. DOD claims that the family of this detainee could be exposed to harm because the detainee told the ARB that the Taliban "'are the people who have destroyed Afghanistan, so I despise these people.'" Hecker Dec. ¶ 15b(2). Again, however, a review of the transcript reveals that much of it is concerned with the detainee's claim that he also is a victim of mistaken identity. *See* Hecker Dec. Ex. 7. Nor has DOD provided any evidence that the detainee's statement that he despises the Taliban would be perceived as so hostile that the Taliban would want to retaliate against his family. To the contrary, neither the detainee nor his family requested that the family's identity remain private.

As DOD has failed to demonstrate that these particular families have an interest in keeping their identities private, there is nothing to balance against the public interest. Nevertheless, there is a significant public interest here as well, especially as to these particular detainees. Both detainees singled out by DOD for particular attention asserted in their ARBs that they are victims of mistaken identity. The public has a strong interest in evaluating whether DOD properly followed-up on these claims. *See* Jan. 23 Order at 14 n.6. In this situation, DOD's claims of harm should be subject to particular scrutiny because the public's ability to investigate and ultimately to know what has actually transpired is diminished by each fact withheld. Here, the public interest outweighs any privacy interest in the identifying information DOD seeks to withhold.

CONCLUSION

For each and all of the foregoing reasons, the Court should deny defendant's motion for summary judgment, and grant AP's motion for an order requiring defendant to provide information that has improperly been withheld under Exemptions 5, 6, and 7(C) and enter such other and further relief as to the Court seems proper.

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Respectfully submitted,

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